



Neutral Citation Number: [2019] EWHC 792 (Pat)

Case No: HP-2018-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PATENTS COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/03/2019

Before :

HIS HONOUR JUDGE HACON
SITTING AS JUDGE OF THE HIGH COURT

Between :

(1) ABLYNX NV
(2) VRIJE UNIVERSITEIT BRUSSEL
- and -
(1) VHSQUARED LIMITED
(2) UNILEVER NEDERLAND B.V.
(3) UNILEVER NEDERLAND HOLDINGS B.V.
(4) UNILEVER RESEARCH AND
DEVELOPMENT VLAARDINGEN B.V.
(5) UNILEVER VENTURES HOLDINGS B.V.
(6) UNILEVER N.V.

Claimants

Defendants

Justin Turner QC (instructed by **Bird & Bird LLP**) for the **Claimants**
Lindsay Lane QC and **Alexander Thomson** (instructed by **Linklaters LLP**) for the
Defendants

Hearing dates: 15th and 18th March 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. In August 1993 the second claimant ('VUB'), a University in Brussels, applied for a European Patent for an invention relating to immunoglobulins derived from camelid antibodies. (Camelids are an animal family which includes camels, llamas and other even-toed ungulates). The Application matured into three granted patents, EP 1 087 013 B1, EP 0 656 946 B2 and EP 1 589 107 B1 ('the Patents'). The Patents expired in August 2013.
2. In April 1997 VUB granted the third defendant ('Unilever NH') a licence under the Patents for use of the inventions in a defined field called the 'Reserved Sector'. Pursuant to subsequent agreements, in December 2010 the first defendant ('VHsquared') became a non-exclusive licensee under the Patents in relation to the Reserved Sector.
3. In November 2001 the first claimant ('Ablynx') became a sub-licensee under the Patents with the exclusive right to exploit the inventions in relation to certain medical uses outside the Reserved Sector.
4. Since 2012 Ablynx has alleged that VHsquared exploited uses of the inventions in breach of Ablynx's rights as exclusive licensee. This has led to litigation in the Netherlands, the present English action and most recently proceedings in Belgium.
5. Ablynx alleges that the UK designations of the Patents ('the Patents UK') were infringed by VHsquared in England before they expired and that the infringing acts have provided a springboard for work done by VHsquared after expiry, causing Ablynx damage. The second to sixth defendants, all part of the Unilever Group, are alleged to be joint tortfeasors.
6. VUB is present as the second claimant because it is the patentee. The main claimant protagonist is Ablynx and I will treat Ablynx as if it were the sole claimant.
7. The defendants have not entered an appearance before this court and apply for a declaration that the English courts have no jurisdiction and a stay of this action. The stay would be pending the outcome of the litigation in Belgium.
8. Lindsay Lane QC and Alexander Thomson appeared for the applicant defendants, Justin Turner QC for the respondent, Ablynx.

The defendants' overall case on jurisdiction

9. Since *Coin Controls Ltd v Suzo International (UK) Ltd* [1997] FSR 660, whenever the validity of a patent has been raised as an issue, the English courts have awarded exclusive jurisdiction to the courts of the EU Member State in which the patent was registered. This exclusive jurisdiction is conferred by art.24(4) of Regulation (EU) 1215/2012 ('Brussels I recast') and previously has been by predecessor articles, i.e. art.22(4) of Regulation 44/2001 and before that art.16(4) of the Brussels Convention on the Jurisdiction and Enforcement of Judgements ('the Brussels Convention'). Art.24(4)

applies also to European patents, exclusive jurisdiction being conferred on the courts of the Member State for which the European patent is designated.

10. The defendants assert that if the present proceedings continue they will allege that the Patents UK are invalid. But they also say that the usual rule on exclusive jurisdiction under art.24(4) does not apply for two reasons.
11. First, the defendants say that VHSquared was licensed to carry out the acts alleged to have infringed the Patents UK. This defence turns on the meaning and effect of the licence agreement of April 1997. That agreement contains an article granting exclusive jurisdiction to ‘the Court of Brussels’ to settle any disputes arising in connection with the agreement. Pursuant to arts.25 and 31(2) of Brussels I recast this court must stay the present proceedings until the relevant Brussels court declares that it has no jurisdiction, should that happen.
12. Secondly, the defendants argue that the validity of the Patents UK would form only an incidental part of this action, since it is really a dispute about the scope of VHSquared’s licence. Accordingly, these proceedings would not be ‘concerned with’ the validity of the Patents UK within the meaning of art.24(4) and therefore art.24(4) is not engaged.
13. The defendants had further arguments in support of their case for a stay, or in one case supporting a claim to strike out the action. They were:
 - (1) There should be a stay pursuant to art.29 of Brussels I recast because these proceedings involve the same cause of action between the same parties as proceedings pending in the Netherlands.
 - (2) There should be a stay pursuant to art.30 in favour of the Netherlands proceedings because the latter are related proceedings within the meaning of art.30.
 - (3) There should be a stay pursuant to s.9 of the Arbitration Act 1996.
 - (4) These proceedings should be struck out because of a cause of action estoppel arising from an earlier, first Dutch action.
 - (5) Service of the claim form and particulars of claim should be set aside because of defects in service.
14. The further arguments (1) and (2) above were adjourned upon Ablynx undertaking (a) to provide written confirmation that in a current Netherlands action no allegation of infringement of the Patents UK will be raised and (b) to amend the Particulars of Infringement to allege infringement of the product of which Ablynx complains in this country. This was done by a letter from Ablynx’s solicitors, Bird & Bird, dated 19 March 2019.

Brussels I recast

15. I set out here the relevant articles of the Regulation.

Article 24

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

...

- (2) *in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;*

...

- (4) *in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.*

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State;

...

Article 25

1. *If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*

- (a) *in writing or evidenced in writing;*
- (b) *in a form which accords with practices which the parties have established between themselves; or*
- (c) *in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

...

4. *Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.*
5. *An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

...

Article 26

1. *Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.*

...

Article 27

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.

...

Article 31

1. *Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.*
2. *Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.*
3. *Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.*

Which court decides whether art.24(4) is engaged

16. In order to discuss this part of the defendants' case, I will assume in their favour that there is an agreement conferring jurisdiction on the Brussels courts which it is valid under its governing law, that it binds Ablynx and that all the issues in these proceedings are subject to that agreement.

17. Ms Lane submitted that the position is clear: art.31(2) is engaged and therefore these proceedings must be stayed. Art.24 could never make a difference in this court because it cannot override art.31(2). That is because art.31(2) is expressly stated to be without prejudice to art.26 but not art.24. The consequence is that all issues arising in these proceedings must be ceded to the Brussels courts, including the question whether art.24(4) is engaged and if so, what should be done about it. It is not the concern of this court.
18. I disagree. To my mind art.25(4) explains why there is no mention of art.24 in art.31(2). Art.31(2) is necessarily without prejudice to art.24 since an agreement relied on for a stay under art.31(2) can carry no legal force if it purports to exclude the courts having exclusive jurisdiction under art.24. Even on the assumptions I have stated, art.31(2) cannot apply if art.24(4) is engaged. Art.24(4)'s engagement depends on whether these proceedings are 'concerned with' the validity of the Patents UK within the meaning of art.24(4). I must resolve this last question before I can decide whether the (assumed) agreement carries legal force and therefore whether art.31(2) is engaged.
19. I also note that art.26 is itself made subject to art.24. This reinforces my view that the recasting of Brussels I has not altered the hierarchy of provisions awarding jurisdiction, with art.24 at the top. Arts.24 and 25 both speak of 'exclusive jurisdiction', but that conferred by art.24 is the more exclusive.

Where the validity of a patent may be decided

20. Ms Lane argued that art.24(4) is not engaged if the validity of the relevant patent in suit is a peripheral issue in the proceedings as a whole. If that is right, the validity of a patent can be resolved by courts outside the Member State in which it was registered.
21. Ms Lane submitted that it is indeed possible for the validity of a patent to be decided by courts other than those of the Member State in which it was registered. She referred me to *JP Morgan Chase Bank NA v Berliner Verkehrsbetriebe (BVG) Anstalt des Öffentlichen Rechts* [2010] EWCA Civ 390; [2012] QB 176. The claimants and defendant had entered a credit swap agreement which contained a clause choosing English law and the jurisdiction of the English courts. The claimants sought a declaration in the English High Court that the agreement was enforceable and for payment of sums due under it. The defendant, which had its seat in Germany, applied for a declaration pursuant to art.25 of Regulation 44/2001 (identical to art.27 of Brussels I recast) that the English courts had no jurisdiction because the dispute was principally concerned with the validity of the decision of one of its organs within the meaning of art.22(2) (in all material respects the same as art.24(2) of Brussels I recast). Therefore, it was argued, the courts of Germany had exclusive jurisdiction.
22. Ms Lane relied on an observation of Aikens LJ (with whom Etherton and Pill LJ agreed) in the middle of paragraph [84]:

“...it is not axiomatic that any proceedings that raise an issue about the validity of the constitution of a company or the validity of a decision of its organ must necessarily be most soundly dealt with by the court of the state where the company has its seat, particularly if the parties have chosen another jurisdiction to solve their disputes...”

23. Ms Lane submitted that since the Court of Appeal was of the view that not all proceedings in which art.24(2) issues are raised have to be heard in the courts given exclusive jurisdiction under art.24(2), the same must apply in relation to art.24(4). The present dispute about the validity of the Patents UK could most soundly be dealt with by the Brussels courts, particularly since (as the defendants contend) the parties have chosen those courts to resolve disputes.
24. I am not sure about this. It seems to me that there are reasons why Aikens LJ's observation should not apply by analogy to art.24(4). As Mr Jenard stated, the grant of patent rights is "an exercise of national sovereignty" (see Jenard Report, OJ 5 March 1979, C59 at 36). In some Member States this may have constitutional implications. I find it difficult to envisage circumstances in which it would be sound for the validity of a patent to be determined outside the courts of the Member State in which it was registered.

Art.24(4): whether proceedings are 'concerned with' the validity of a patent

25. In any event, whether such circumstances are possible must depend on the correct construction of art.24(4). That provision is engaged if the proceedings are 'concerned with' the validity of the patent. The question is what that means.
26. In *Coin Controls Ltd v Suzo International (UK) Ltd* [1997] FSR 660, Laddie J held that because the defendant, who was alleged to infringe foreign patents, had raised the issue of their validity, the court had to decline jurisdiction. He said at p.676 (in this and subsequent quotations from authorities, for clarity I have substituted the numbers of the articles in Brussels I recast for their equivalents in Regulation 44/2001 and the Brussels Convention):

"To start with, I cannot accept the argument that Article [27] is only concerned with claims, meaning the assertions made by the party who initiates the proceedings. It must be concerned with what is in issue before the court. In some patent infringement proceedings it is really only validity which is in dispute. The function of Article [27] appears to me to be to ensure that litigation covered by the exclusive jurisdiction provisions of Article [24] are determined in the court having exclusive jurisdiction. If Mr Silverleaf was right, which court would have jurisdiction would be determined by which party managed to commence proceedings first.

In the absence of binding authority, I also do not accept the second argument as to the meaning of 'principally concerned'. I can see no reason to give the Article a narrow linguistic interpretation. The Jenard report suggests that what is excluded is incidental matter. Something which is a major feature of the litigation is not incidental and is therefore a matter with which the action is principally concerned. The issue which has to be decided then is whether the three foreign claims sought to be raised in the English courts are principally concerned, in this broad sense, with the issue of validity of the foreign patents."

27. Laddie J continued (at p.677), referring to *Plastus Kreativ AB v Minnesota Mining and Manufacturing Co* [1995] RPC 438 and *Pearce v Ove Arup Partnership Ltd* [1997] FSR 641:

“As I have said, validity is frequently in issue, and sometimes the most important issue, in English patent infringement proceedings. This is now enshrined in section 74(1)(a) of the Patents Act 1977 . We have always taken the view that you cannot infringe an invalid patent. This was restated by Aldous J. in the passage from *Plastus* quoted above. However the fact that the defendant can challenge validity does not mean that he will. In *Plastus* he did not. Until he does, only infringement is in issue and the approach in *Pearce* applies. The court cannot decline jurisdiction on the basis of mere suspicions as to what defence may be run. But once the defendant raises validity the court must hand the proceedings over to the courts having exclusive jurisdiction over that issue. Furthermore, since Article [27] obliges the court to decline jurisdiction in relation to claims which are ‘principally’ concerned with Article [24] issues, it seems to follow that jurisdiction over all of the claim, including that part which is not within Article [24] must be declined. It may well be that if there are multiple discrete issues before a court it will be possible to sever one or more claims from another and to decline to accept jurisdiction only over those covered by Article [24], but I do not believe that that approach applies where infringement and validity of an intellectual property right are concerned. They are so closely interrelated that they should be treated for jurisdiction purposes as one issue or claim.”

28. Thus, Laddie J ruled that validity and infringement could not be separated when considering whether art.24(4) applies. He implied that whenever validity is raised, art.24(4) is invariably engaged.
29. The passage from p.677 of the report of *Coin Controls* set out above was quoted in full and expressly approved by Lord Woolf MR giving the judgment of the Court of Appeal in *Fort Dodge Limited v Akzo Nobel NV* [1998] FSR 222, at 244-5.
30. The Court of Appeal in *Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2003] EWCA Civ 327; [2004] FSR 25 at [21] endorsed the entirety of Laddie J’s analysis, including all the passages from *Coin Controls* cited above.
31. In *Gesellschaft für Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK)* [2006] FSR 45 (C-4/03) EU:C:2006:457; [2006] ECR I-6509, the German claimant sought a declaration of non-infringement of French patents in a German court. At paragraph 14 the Court of Justice confirmed that the question whether proceedings are ‘concerned with’ the validity of a patent is an independent concept subject to EU law. The Court continued (I have changed not only the article numbers to the equivalents in Brussels I recast but also, to avoid confusion, references to ‘the Convention’ have been changed to ‘the Regulation’):

“[19] Article [27], which, in certain language versions, refers to a claim being brought ‘principally’, does not provide further clarity. Apart from the fact that the degree of clarity of the wording of that provision varies according to the particular language version, that provision, as the Commission has observed, does not confer jurisdiction but merely requires the court seised to examine whether it has jurisdiction and in certain cases to declare of its own motion that it has none.

[20] In those circumstances, Art.[24(4)] must be interpreted by reference to its objective and its position in the scheme of the [Regulation].

[21] In relation to the objective pursued, it should be noted that the rules of exclusive jurisdiction laid down in Art.[24] of the [Regulation] seek to ensure that jurisdiction rests with courts closely linked to the proceedings in fact and law.

[22] Thus, the exclusive jurisdiction in proceedings concerned with the registration or validity of patents conferred upon the courts of the Contracting State in which the deposit or registration has been applied for or made is justified by the fact that those courts are best placed to adjudicate upon cases in which the dispute itself concerns the validity of the patent or the existence of the deposit or registration (*Djuinstee*, [22]). The courts of the Contracting State on whose territory the registers are kept may rule, applying their own national law, on the validity and effects of the patents which have been issued in that State. This concern for the sound administration of justice becomes all the more important in the field of patents since, given the specialised nature of this area, a number of Contracting States have set up a system of specific judicial protection, to ensure that these types of cases are dealt with by specialised courts.

[23] That exclusive jurisdiction is also justified by the fact that the issue of patents necessitates the involvement of the national administrative authorities (see, to that effect, the Report on the Convention by Mr Jenard, [1979] O.J. C59/1 at 36).

[24] In relation to the position of Art.[24] within the scheme of the [Regulation], it should be pointed out that the rules of jurisdiction provided for in that article are of an exclusive and mandatory nature, the application of which is specifically binding on both litigants and courts. Parties may not derogate from them by an agreement conferring jurisdiction (fourth paragraph of Art.[25] of the [Regulation]) or by the defendant's voluntary appearance (Art.[26] of the [Regulation]). Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have jurisdiction by virtue of Art.[24], it must declare of its own motion that it has no jurisdiction (Art.[27] of the [Regulation]). A judgment given which falls foul of the provisions of Art.[24] does not benefit from the system of recognition and enforcement under the Convention ([Art.45(1)(e)] and [Art.46] thereof).

[25] In the light of the position of Art.[24(4)] within the scheme of the [Regulation] and the objective pursued, the view must be taken that the exclusive jurisdiction provided for by that provision should apply whatever the form of proceedings in which the issue of a patent's validity is raised, be it by way of an action or a plea in objection, at the time the case is brought or at a later stage in the proceedings.

[26] First, to allow a court seised of an action for infringement or for a declaration that there has been no infringement to establish, indirectly, the

invalidity of the patent at issue would undermine the binding nature of the rule of jurisdiction laid down in Art.[24(4)] of the [Regulation].

[27] While the parties cannot rely on [Art.24(4)] of the [Regulation], the claimant would be able, simply by the way it formulates its claims, to circumvent the mandatory nature of the rule of jurisdiction laid down in that article.

[28] Secondly, the possibility which this offers of circumventing [Art.24(4)] of the [Regulation] would have the effect of multiplying the heads of jurisdiction and would be liable to undermine the predictability of the rules of jurisdiction laid down by the [Regulation], and consequently to undermine the principle of legal certainty, which is the basis of the [Regulation] (see Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG* [2002] E.C.R. I-1699 [24] to [26], Case C-281/02 *Owusu v Jackson* [2005] E.C.R. I-1383 [41], and Case C-539/03 *Roche Nederland and Others v Primus and Goldenberg* [2006] E.C.R. I-0000 [37]).

[29] Thirdly, to allow, within the scheme of the [Regulation], decisions in which courts other than those of a State in which a particular patent is issued rule indirectly on the validity of that patent would also multiply the risk of conflicting decisions which the [Regulation] seeks specifically to avoid (see, to that effect, Case C-406/92 *Tatry* [1994] E.C.R. I-5439, [52], and *Besix*, cited above, [27]).”

32. In particular at para. 25 (which formed the basis of the Court’s final ruling), the Court of Justice held that art.24(4) applies irrespective of the nature of the patent proceedings. The Court of Justice did not say that art.24(4) is invariably engaged when validity is in issue, although the judgment is not inconsistent with that view.

33. I return to *JP Morgan*. Aikens LJ reviewed the authorities on what is now art.24(2), including the judgment of the Court of Justice in *Hassett v South Eastern Health Board* (C-372/07) ECR I-7403:

“[63] The ECJ held that article [24(2)] was not to be interpreted as embracing all proceedings where a decision of an organ of a company was being challenged; that would give too wide an interpretation to article [24(2)] and would undermine the supremacy of the general jurisdictional regime of the Regulation.”

34. Aikens LJ went on to consider what is now art.24(4). He summarised the facts of *Coin Controls* and continued (referring also to cases dealing with the equivalent to art.24(2): *Newtherapeutics Ltd v Katz* [1991] Ch 226 and *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah* [1996] 1 Lloyd’s Rep 7):

“[66] Laddie J noted that he had not been shown any case in which the meaning of ‘principally concerned’ in article [24] had been considered. He was not referred to either the *Newtherapeutics* case or the *Grupo Torras* case on the relationship between article [24] and article [27]. Nor was he shown ECJ decisions which held that the provisions of article [24] must not be given an interpretation that was broader than was required by their objective. Therefore,

with respect, Laddie J was incorrect to state, [at 676], ‘I can see no reason to give the article a narrow linguistic interpretation,’ whether that remark is aimed at article [24] or article [27] or both. Nor, in my view, does it follow, as Laddie J seemed to think, that if an issue in litigation is not incidental it must be a ‘major feature of the litigation’ which must therefore be ‘a matter with which the action is principally concerned’. Laddie J did not deal directly with the correct construction of the words ‘concerned with’ in article [24(4)]. So, in my view, the comments of Laddie J concerning the interpretation of article [24(4)] and its relationship with article [27] have to be treated with caution.

[67] However, Laddie J went on to hold that where infringement of a patent and the validity of a patent were raised in proceedings they were so closely related that they should be treated ‘for jurisdiction purposes’ as one issue or claim. He demonstrated how an attack on the validity of a patent would directly impinge on the issue of infringement.

[68] Laddie J’s analysis of the relationship between an allegation of infringement of a patent and a defence of invalidity of the patent for the purposes of article [24(4)] was approved by the Court of Appeal in *Fort Dodge Animal Health Ltd v Akzo Nobel NV* [1998] FSR 222, paras 30-31. Therefore in an action in which the claimant alleged patent infringement by the defendants and the defendants alleged that the patent was invalid, if the alleged infringing acts fell within the ambit of the claim to a patent for the purposes of article [24(4)] the claim was ‘principally concerned’ with the validity of the patent, which in that case was a UK patent.

[69] In my view the statements of Laddie J and the Court of Appeal are relevant only to cases in which infringement and validity of a patent were raised. They are analysed as being cases where there was only one issue or claim involved. Therefore there was no need, in either case, for either court to consider how article [24(4)] or article [27] had to be interpreted when a case involved multiple issues.

[70] The analyses of Laddie J and the Court of Appeal on the relationship between issues of infringement and validity of a patent for the purposes of articles [24(4)] and [27] appear to have been implicitly approved by the ECJ by its decision in the *GAT* case [2006] ECR I-6509. ... ”

35. Thus, Aikens LJ accepted that where only infringement and validity are in issue in a patent action, both should be heard by the courts of the Member State in which the patent was registered. But he took the view that neither *Coin Controls* nor *Fort Dodge* was authority for the meaning of ‘concerned with’ in art.24(4) or how the meaning affected a patent case involving multiple issues.
36. Aikens LJ went on to consider that meaning. He mostly dealt with what is now art.24(2) but apparently intended the same principles to apply to art.24(4). I should add that in the English language version of Brussels I recast there is a difference in wording between arts.24(2) and (4), in that art.24(2) requires that the proceedings ‘have as their object’ a relevant matter, whereas in art.24(4) the requirement is that they are ‘concerned with’ a relevant matter. In other language versions of art.24 there is no such difference in the wording, see Briggs, *Civil Jurisdiction and Judgments*, 6th ed. at ¶2.73

and *Fujifilm Kyowa Kirin Biologics Company Ltd v Abbvie Biotechnology Ltd* [2016] EWHC 2204 (Pat) at [72]. Like Briggs and Arnold J in *Fujifilm*, I understand Aikens LJ to have regarded the difference in wording in the English version as being of no significance.

37. Aikens LJ said:

“[83] The proper interpretation of article [24(2)] has to be derived from its wording, its objective, its position in the scheme of the Regulation, the ECJ decisions on article [24] and its predecessor, the commentary of Mr Jenard and the English cases on the article. My conclusions on its interpretation are as follows. First, I think we are bound by English Court of Appeal authority to interpret the words ‘proceedings which have as their object’ in article [24(2)] as ‘proceedings which are principally concerned with’. Although the Court of Appeal in the *Grupo Torras* case [1996] 1 Lloyd’s Rep 7 stated that the words could also mean ‘proceedings which have as their subject matter’, I prefer the former formulation because it links with the wording in article [27], ie, ‘a claim which is principally concerned with’. That interpretation also accords with the French text. That construction is entirely consistent with the analysis of Mr Jenard to which I have referred above.

[84] Secondly, I reject the submission of Mr Lord that the opening phrase of article [24(2)] must be read in such a way that if proceedings raise any issue within article [24(2)], ie, if the proceedings are concerned with the validity of the constitution of a company (etc) or the validity of the decisions of its organs (etc), then that is sufficient to make those proceedings ‘principally concerned with’ that issue. There is nothing in the wording of the article to warrant that broad interpretation. It is not consistent with the interpretation suggested by Mr Jenard, who talks of the proceedings being ‘in substance concerned with’ the items set out in article [24(2)]. The ECJ has stated more than once that article [24] generally is to be given an interpretation no broader than is necessary to fulfil its objective of ensuring that the sound administration of justice is achieved by giving exclusive jurisdiction to the courts of the state concerned with the relevant land, company, public registers, patents and so forth. But it is not axiomatic that any proceedings that raise an issue about the validity of the constitution of a company or the validity of a decision of its organ must necessarily be most soundly dealt with by the court of the state where the company has its seat, particularly if the parties have chosen another jurisdiction to solve their disputes. The validity issue may be one of many other issues which have nothing to do with the validity of the company or the validity of decisions of its organs, and those other issues may have to be decided by a different applicable law and may concern facts which are unrelated to the state where the company has its seat. In such a case the sound administration of justice could well require the courts of another state to determine the issues. That is even more so when the parties have agreed a jurisdiction for the resolution of disputes. This conclusion is, I think, clearly supported by the approach of the ECJ in the *Land Oberösterreich* case and in the *Hassett* case.

[85] Thirdly, I reject the submission of Mr Lord that if proceedings raise a number of issues and one of them is within the terms of article [24(2)] and the resolution of that issue may be dispositive of the proceedings as a whole, that

must mean that the proceedings are ‘principally concerned with’ an issue within article [24(2)]. Again, that is not what the article states. It is inconsistent with Mr Jenard’s commentary. If the test is: what are the proceedings ‘principally concerned with’, as the English Court of Appeal has held, then one issue which may be dispositive may be what the proceedings are principally concerned with, but it is not necessarily the case. No ECJ decision has given the article that interpretation. The *GAT* case does not support this proposition because that was a patent case and, as the ECJ makes clear in its judgment, when an infringement claim raises the issue of validity of the patent they are really two aspects of one issue. The *Coin Controls* and *Fort Dodge* cases are to the same effect. For the reasons I have already set out neither does the *Land Oberösterreich case* [2006] ECR I-4557 support Mr Lord’s submission.

[86] There are no other English cases which support this submission of Mr Lord. In my view the statements of Knox J in the *Newtherapeutics case* [1991] Ch 226 are contrary to his submission. Although the judge accepted that the company could win the action on either of the two issues raised, Knox J was concerned to find the principal issue in the proceedings, as Teare J noted [2010] QB 276, para 29. Further, the whole approach of Mance J in the *Grupo Torras case* [1995] 1 Lloyd’s Rep 374 is contrary to Mr Lord’s submission. Mance J held, at pp 403–404, that article [24(2)] called for an exercise in ‘overall classification’ and an ‘overall judgment’, by which the court attempts to assess whether the proceedings are so closely connected with matters of local company law and internal corporate decision-making that the proceedings should not be tried anywhere else but in the courts of the state of the company’s seat. The Court of Appeal [1996] 1 Lloyd’s Rep 7 endorsed this overall approach. It means that if a court is faced with a dispute on whether article [24(2)] applies it has to decide on the principal concern of the proceedings overall. I do not accept that the statement of Chadwick LJ in *Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2003] 1 WLR 2295, para 25 is support for the proposition that, for article [24(2)] purposes, one set of proceedings can be principally concerned with several issues. Chadwick LJ was not dealing with such an argument in that case. Article [31] of the Regulation does not itself address the question of how to determine what a particular action is concerned with to see whether the exclusive jurisdiction provisions of article [24] apply or not.

[87] Fourthly, given my view that the Court of Appeal in the *Grupo Torras case* [1996] 1 Lloyd’s Rep 7 did endorse the approach of Mance J that a court has to undertake an exercise in ‘overall classification’ and make an ‘overall judgment’ to see whether the proceedings are ‘principally concerned’ with one of the matters set out in article [24(2)], we are bound to follow that interpretation unless there has been a subsequent decision of the ECJ (or House of Lords) which has stated a contrary interpretation. There is none.

[88] In any case, in my respectful view the interpretation of Mance J was correct. It fits with the wording of article [27]. It also fits with the objective of article [24] which is to give exclusive jurisdiction to the courts of the state which will be best suited to dealing with the relevant issue, depending on which paragraph of article [24] is in play. It is only necessary to displace the general

rule as to jurisdiction or the parties' own agreed jurisdictional choice if, making an overall judgment, it is clear that granting jurisdiction to the courts of the relevant state (where the land is, where the company has its seat, where the patent is registered, etc) will result in the sound administration of justice. In the context of article [24(2)] this will not be the case unless, overall, the proceedings are so closely connected with matters of local company law and internal corporate decision-making in respect of the company that the proceedings should not be tried anywhere but in the courts of the state where the company has its seat.

[89] Fifthly, whilst I respectfully accept that Mr Jenard must be right in saying that if an issue within article [24(2)] is only a 'preliminary or incidental matter' in some proceedings, they cannot be 'principally concerned' with article [24(2)], the converse does not follow. Even if an issue within article [24(2)] is not simply a 'preliminary' or 'incidental' matter, it does not necessarily mean that, looking at the proceedings overall, they are proceedings which are 'principally concerned' with article [24(2)] matters. That will depend on the overall classification or overall judgment. In so far as Laddie J may have come to the opposite conclusion in the *Coin Controls* case I think he was wrong.

[90] Therefore I conclude that Teare J reached the right conclusion on the interpretation of article [24(2)], as stated at para 46 of his judgment. Put in the context of this case, I agree with him that the question is whether the English proceedings are 'in substance or principally concerned with the ultra vires issue raised by BVG by way of defence to JPM's claim'."

38. At [84] Aikens LJ referred to the ECJ having ruled that art.24 generally is to be given an interpretation no broader than is necessary to fulfil its objective of ensuring that the sound administration. I take this to be a reference in particular to *Land Oberösterreich v ĀEZ A.S.* (Case C-343/04) [2006] ECR I-4557 (at [26]) which was concerned with what is now art.24(1), and *Hassett v South Eastern Health Board* (Case C-372/07), [2008] ECR I-7403 at [18]-[19], in which the Court of Justice was dealing with what is now art.24(2). By contrast, the Court of Justice has stated that art.24(4) and its predecessors must be interpreted "widely" in order to ensure its effectiveness, see *Solvay SA v Honeywell Fluorine Products Europe BV* (C-616/10) EU:C:2012:445 at [44]. This might support the suggestion that there is a distinction between arts.24(1) and (2) on the one hand and (4) on the other, and that the latter is to be applied more widely than the two former paragraphs.
39. As against that, it appears to have been argued before the Court of Appeal in *JP Morgan* that the judgment of the Court of Appeal in *Prudential Assurance* had approved Laddie J's contention that once the validity of a patent is raised in proceedings, the totality of the proceedings must be ceded to the courts of the Member State in which the patent is registered. The same point may also have been argued by reference to the Court of Appeal's judgment in *Fort Dodge*. This argument was clearly not accepted in *JP Morgan*. Aikens LJ stated that in *Prudential Assurance* and *Fort Dodge* are authority for the proposition that infringement and validity of a patent are two aspects of the same issue, but he was of the view that those judgments are not authority for any larger principle.

40. Aikens LJ was also clear that at least in the context of art.24(2), the sound administration of justice could require the courts of another Member State to determine art.24(2) issues, even more so where the parties have agreed on the courts of another Member State as the forum for disputes.
41. Although *JP Morgan* is not binding in relation to art.24(4), Aikens LJ's detailed analysis of the law took into account the judgments of the Court of Appeal in both *Fort Dodge* and *Prudential Assurance*. I believe I must therefore follow *JP Morgan*. Consequently the present proceedings are 'concerned with' the validity of the Patents UK if, pursuant to an overall assessment, the proceedings are in substance or principally concerned with validity, but not otherwise.

Whether severing issues is an option

42. The question arises next whether issues in a single set of proceedings can be severed, so that one court will determine the issue or issues which are subject to exclusive jurisdiction under art.24 while a court elsewhere rules on the other issues. In practice this would involve the stay of part or parts of an action as opposed to severance in a strict sense but it makes no difference.
43. The interpretation of art.24 is a matter of EU law, see *GAT* at [14], so this would not be a question of English case management. The judgment of the Court of Justice in *GAT* appears to rule out the separation of infringement from validity where both are pleaded. It also seems to me that the rationale underlying the judgment of the Court of Appeal in *JP Morgan* is inconsistent with the idea of any form of severance. The court must reach an overall judgment about whether the proceedings as whole are principally concerned with matter falling within art.24(4). Having done so, either there is a stay of the proceedings or there is not. I was not referred to any case other than *Coin Controls* which mentioned severance. Again following *JP Morgan* I take the view that severance is not an option.

Whether validity must already be in issue

44. In *Knorr-Bremse Systems for Commercial Vehicles Ltd v Haldex Brake Products GmbH* [2008] EWHC 156 (Pat), Lewison J considered *GAT* and *Coin Controls* and said this:

“[46] It is clear in my judgment that Laddie J. held that where it is clear that validity 'is to be' put in issue (i.e. in the future) the court should decide the application on the basis that validity is one of the issues in the case. It is not necessary for the allegation of invalidity to be formally pleaded. I respectfully agree. If the current action were to be stayed, what would prevent KBS UK starting a new action tomorrow alleging invalidity as well as non-infringement? Even if Haldex rushed off to the *Landgericht*, that court would have to decline jurisdiction once the allegation of invalidity of the UK designations of the European patents had been raised here. I cannot see the point of that. In my judgment the challenge to validity of the patents has been raised, with the consequence that, unless KBS is bound by the non-challenge clause, this court has exclusive jurisdiction.”

45. When considering whether art.24(4) is concerned with validity, this is not to be done merely by looking at the pleadings as they stand. The court must rely on whatever evidence is available and come to a view on the balance of probabilities as to the form which the proceedings will take at trial, including the relative significance of the likely issues.

Article 31(2)

46. Art.31(2) is new: it did not exist in the predecessors to Brussels I recast. Before Brussels I recast entered into force, litigants who favoured delay could bring proceedings before the courts of a Member State in which delay was conveniently a reliable characteristic. This worked even if the parties had chosen the courts of another Member State to resolve disputes. In *Erich Gasser GmbH v MISAT Srl*, C-116/02, EU:C:2003:657; [2003] ECR I-14693 the Court of Justice ruled that a court in favour of which the parties had made an exclusive jurisdiction agreement, but which had been seised second, had no jurisdiction to hear the case while the same dispute between the same parties was pending before the court first seised, even if the latter had been seised in breach of contract. Such a manoeuvre was sometimes styled ‘the Italian torpedo’.
47. Art.31(2) was intended to remove the threat of Italian torpedoes in cases like *Gasser*. Art.24 was not in issue in *Gasser* and for the moment I leave art.24 to one side.
48. Art.31(2) on its face leaves open at least two questions. The first is whether, in order to rely on art.31(2), a party merely needs to assert that there is an art.25 agreement conferring jurisdiction over the dispute on the courts of another Member State, or whether this must be proved to a higher, and if so what, standard. Secondly, is the court before which a stay is sought entitled to consider the validity and true effect of the alleged agreement relied on?
49. Recital [22] to Brussels I recast suggests an answer to the second question. It states:
- “[22] However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.”
50. The penultimate sentence indicates that the designated court, i.e. the court chosen to resolve disputes, has priority in deciding the validity and effect of the alleged agreement. What this is likely to mean in practice was discussed by the authors of

Cheshire, North & Fawcett, *Private International Law*, 15th ed., at p.453 (omitting footnotes):

“The intention is clearly that the court first seised should give way to the court designated in the ‘agreement’, without itself determining whether the jurisdiction clause is valid or applicable. What the reform leaves out, therefore, is the threshold for the application of this rule. It should not be sufficient that a party merely claims (without evidence) that the dispute is covered by an exclusive jurisdiction agreement, otherwise the rule would clearly be open to a variation on the tactical litigation experienced as a result of the *Gasser* decision, with parties spuriously claiming jurisdiction agreements in favour of, for example, the Italian courts, and commencing proceedings in Italy accordingly, in order to frustrate the jurisdiction of the English courts. Nor should it be necessary to establish that a jurisdiction agreement actually governs the dispute, otherwise this decision would need to be made by any court seised to determine whether the rule applies, which would defeat the objective of the rule. For the rule to apply, there clearly must be some intermediate standard – an ‘apparent’ exclusive jurisdiction agreement, or a ‘prima facie’ exclusive jurisdiction agreement. This question will have to be clarified by the courts and eventually the Court of Justice, and it is unfortunate that it was not addressed more clearly in Brussels I recast.”

51. I find this persuasive. The party seeking a stay under art.31(2) has to satisfy the court that there is a *prima facie* case that there is an agreement awarding jurisdiction to courts of another Member State, that it is valid under its governing law and that on a proper construction the agreement covers the proceedings before the court. There is a hurdle but it is a low one. If passed, the court must stay the proceedings before it, ceding the dispute to the chosen forum unless and until that forum declares that it has no jurisdiction. A similar view has been taken by Hartley, *Choice-of-Court Agreements under the European and International Instruments*, at p.229 and Dickinson and Lein, *The Brussels I Regulation Recast* at p.340.
52. Mr Turner said that he was prepared to accept the *prima facie* test for the purposes of this application. I agree with the test and will take it to be correct.

The relationship between arts.24 and 31(2)

53. To a large degree I have already considered the interaction between arts.24 and 31(2) but will state my view in summary:
 - (1) When a stay is sought under art.31(2), if an argument is raised that the court before which the stay is sought has exclusive jurisdiction under art.24, that court must decide whether the argument is correct.
 - (2) If the court has exclusive jurisdiction under art.24, art.31(2) is not engaged. There will be no stay.
 - (3) If the court does not have exclusive jurisdiction under art.24, it must decide whether at least *prima facie* there is an agreement which satisfies art.25 and which confers exclusive jurisdiction on courts of another Member State. If so,

provided the defendant has not entered an appearance in a manner which satisfies art.26, there must be a stay of the proceedings.

The licences and the Dutch litigation

54. Before applying arts.24(4) and 31(2) to the facts of this case it is necessary to say more about the licences granted and the two Dutch proceedings.

The licences

55. The Patents are derived from a single European Application. On 16 April 1997 the patentee, VUB, entered into an agreement with the third defendant ('Unilever NH') which included a worldwide licence granted to Unilever NH ('the Unilever Licence') under the Patents for certain applications of the inventions. The licence was partly exclusive and partly non-exclusive. The exclusive licence was defined as follows ('the University' is VUB):

“3.1.a The University shall grant Unilever an exclusive and territorially unlimited licence to exploit [the Patents] and corresponding foreign patents ... for the following products and sectors:

- (i) packed food products;
- (ii) washing and cleaning agents;
- (iii) cosmetics with a non-medical orientation; and
- (iv) process auxiliary agents, more specifically the catalytic and separation process auxiliary agents, for use in fields (i), (ii) and (iii) above.”

56. The foregoing permitted field of use was defined as the 'Reserved Sector'.
57. There was also a non-exclusive licence in respect of “[over-the-counter] diagnostics for non-medically oriented cosmetic products, for the use of antibodies in cattle fodder” and related agents.
58. Article 9 of the Unilever Licence stated:

“9. **Applicable law and settlement of disputes**

9.1 Belgian law shall govern this Agreement. The Court of Brussels shall alone be competent in case of dispute between the Parties or one of their (sub)licensee(s) concerning this Agreement.

9.2 In exemption from Article 9.1, the Parties hereby also agree that all disputes on the definition of the Reserved Sector, the scope of [the Patents] and its delimitation from the Community Patents shall exclusively be settled by arbitral tribunal consisting of one jurist and two scientists, sitting in Brussels, according to the rules of the International Chamber of Commerce.”

59. On 23 September 1998 VUB granted a licence under the Patents ('the VIB Licence') to the Vlaams Instituut voor Biotechnologie vzw ('VIB'). It was an exclusive worldwide

licence for all fields except the Reserved Sector. The Reserved Sector was expressly defined to have the same meaning as in the Unilever Licence. VIB declared that it was aware of the Unilever Licence. VIB was also granted a non-exclusive licence in respect of the same products for which Unilever NH had been granted a non-exclusive licence.

60. On 14 November 2001 VIB granted to Ablynx an exclusive sub-licence under the VIB Licence ('the Ablynx Licence'). The field of use was defined as:
- “... the use of Camel antibodies to develop products and processes for predicting, diagnosing, monitoring, preventing and treating diseases in animals and humans...”
61. The Ablynx Licence could not be broader than the exclusive VIB Licence, so its permitted field necessarily excluded the Reserved Sector. The Ablynx Licence contained an acknowledgment by Ablynx that it had received a copy of the Unilever Licence in which the Reserved Sector had been defined.
62. By an agreement dated 2 June 2005 ('the Novation Agreement') between VUB, Unilever NH and BAC IP BV ('BAC'), the Unilever Licence was novated from Unilever NH to BAC. BAC was part of the Unilever group, under consideration for spinning off. Under the terms of the Novation Agreement, BAC granted back to Unilever NH a non-exclusive worldwide licence to exploit the Patents in the Reserved Sector.
63. The Novation Agreement contained the following terms:
- “3.1 With effect from ... (the 'Novation Date'):
- (a) BAC agrees to assume all the obligations and liabilities of Unilever to the University under or arising from the [Unilever Licence] except to the extent that such obligations have been fully and properly discharged before the Novation Date;
- ...
- (d) [VUB] agrees with BAC to be bound by its obligations under the [Unilever Licence] (to the extent that they have not been fully and properly discharged prior to the Novation Date) in every way as if BAC had been a party to the [Unilever Licence] in place of Unilever, except if explicitly stated otherwise in this Agreement.
- ...
- 7.1 This Agreement and any dispute or claim arising out of it shall be governed by, and construed in accordance with, Belgian law.
- All disputes or claims arising out of or relating to this Agreement shall be subject to the non-exclusive jurisdiction of the Courts of Brussels, to which the parties irrevocably submit.”
64. By an agreement dated 22 December 2010 Unilever NH granted VHSquared a sub-licence under the Patents for the Reserved Sector.

65. In summary, by 2011 Ablynx had the exclusive right to exploit the inventions claimed in the Patents by using camel antibodies for certain medical uses. For its part, VHSquared had a non-exclusive licence to exploit the inventions in the Reserved Sector.

The first Dutch litigation

66. On 26 November 2012 Ablynx began proceedings in the Hague District Court against Unilever NH, the Unilever companies which are now the second, fourth and sixth defendants in these proceedings and BAC. The Dutch Court of Appeal later called the defendants in that action collectively ‘Unilever’ and I will do likewise.
67. Ablynx alleged infringement of one of the Patents, namely EP 1 087 013 BI (‘the 013 Patent’). Ablynx said that Unilever had conducted research in Bangladesh and India, the result of which was an antibody against rotavirus (‘the rotavirus antibody’). Ablynx also alleged that Unilever intended to produce the rotavirus antibodies in the Netherlands and that this would infringe the 013 Patent. A declaration of infringement in the Netherlands was sought. Ablynx also applied for a declaration of infringement of the 013 Patent outside the Netherlands, by implication including infringement of the UK designation of the 013 Patent.
68. On 4 December 2013 The Hague District Court dismissed the action on the ground that Unilever was licensed under the 013 Patent to carry out the acts said to infringe.
69. Ablynx appealed. The argument on appeal centred on the scope of Unilever’s acknowledged licence. Unilever’s case was that it was undoubtedly licensed to produce packaged food products and that there was no limitation as regards the nature of those packaged products. They could be what Unilever called ‘functional foods’, including foods containing the rotavirus antibodies.
70. Ablynx’s stance to begin with was that Unilever’s licence did not cover any sort of medicinal product whatever it was.
71. In its judgment on 7 June 2016 the Court of Appeal indicated that it had found Ablynx’s argument to be overbroad, in that functional foods could fall within Unilever’s licence. During the hearing Ablynx adapted its argument to deal with the Court’s view. The judgment records that Ablynx narrowed its claim to a new declaration of infringement in the Netherlands by reference to:

“products with a therapeutic or prophylactic effect with regard to specific pathogens, whatever the nature of those products”.

72. The Court of Appeal’s judgment discusses for the most part the declaration of infringement sought for the Netherlands. The Court rejected Unilever’s argument that they were entitled to make any sort of packaged foodstuff. It held (in agreed translation):

“4.10 The term (packaged) foodstuff is also unsuitable to serve as a limitation, now that the qualification as foodstuff, as Unilever et al. appears to fail to understand, does not exclude that such a product must also be deemed a medicinal product, while – as Unilever acknowledges – it is precisely medicinal products that are excluded from the licence. In addition, Unilever asserted that

its licence did not extend to ‘pills, syringes or powders (products that can be purchased from a pharmacy)’. The location where the products are offered cannot, however, be deemed a suitable delineation. After all, medicinal products are also offered in supermarkets, while foodstuffs (including *functional foods*) can also be sold in pharmacies and are not to be deemed a medicinal product.”

73. In broad terms both sides to the litigation agreed that Ablynx’s exclusive licence was for certain medicinal products whereas Unilever’s licence was for non-medicinal products. The difficulty was being precise about where the line was to be drawn:

“4.12 ... What keeps the parties divided is what ‘medicinal product’ is to be understood to mean in this respect. As this limitation, which is acknowledged by both parties, is not included in the licence agreement itself, the literal wording of the agreement itself cannot provide any clarity about the contents and meaning of that term – and thus of the scope of the licence. The Court of Appeal sees cause in these circumstances of this case to not only take note of the history of the making of the licence agreement, in order to determine what sense each of the parties could reasonably expect of each other in this respect. This approach is also in accordance with Belgian law that applies to the licence agreement, which stipulates that account must be primarily taken of the common intent of the parties ...”

74. The Court of Appeal found that the new limited declaration sought by Ablynx was satisfactory:

“4.11 ... This limitation particularly does justice to the reasonable expectation – acknowledged by Ablynx – that Unilever could have that it was allowed to develop and market *functional foods* under the licence, which have a ‘general’ health promoting effect, in the sense that this seeks to promote the intrinsic functioning of the body. This includes foodstuffs to increase resistance, to reduce the cholesterol level and/or blood pressure, to optimise the functioning of the intestines and of organs like the liver and kidneys.

...

... this limitation also does justice to VUB’s expectation that the licence did *not* include products – whether or not they are deemed to be foodstuff – for curing (therapeutic effect) or prevention (prophylactic effect) of ailments caused by pathogens (pathogens of biological origin, of which viruses, bacteria and moulds are the most common).” (original italics)

75. The Court of Appeal granted a declaration of infringement of the Netherlands designation of EP 013 in the amended form suggested by Ablynx.

76. The other declarations, including two which encompassed the UK designation of the 013 Patent, were only briefly discussed (at para. 4.16). They were dismissed on the grounds that (i) they had not been similarly narrowed, (ii) there was insufficient evidence to support them, (iii) they were broad enough to cover acts which Unilever was licensed to do, or (iv) it was not clear what interest Ablynx had in them over and above the declaration granted.

77. Unilever appealed to the Dutch Supreme Court and the appeal was dismissed. Ablynx did not seek to appeal further.

The second Dutch litigation

78. On 1 June 2017 Ablynx started new proceedings before The Hague District Court against the same defendants plus the Unilever company which is the fifth defendant in these proceedings. I will continue to refer to them collectively as ‘Unilever’. In this second action Ablynx sought preliminary witness hearings to find out what had been done while the Patents were in force in relation to the claimed inventions. Ablynx signalled an intention to bring proceedings against VHsquared and Unilever for marketing products developed before the expiry of the Patents. The request listed 24 witnesses whom Ablynx wished to examine, all of them directors or employees of VHsquared, or alternatively consultants, investors or inventors associated with VHsquared.
79. In a judgment dated 26 October 2018 The Hague District Court ordered the examination of 5 witnesses. On 25 January 2019 VHsquared sought to intervene and appeal. On 14 February 2019 the Court of Appeal ruled that the appeal will be heard on 12 September 2019 but in the meantime the witness hearings ordered by the District Court should go ahead. They took place on 18 and 19 February 2019. I understand that further witnesses may be called and that VHsquared may call Ablynx witnesses in response.
80. Because of information which had become available not long before the start of the second Dutch action, the infringement alleged by Ablynx became newly directed at a product called ‘V565’ developed by VHsquared. V565 is an oral preparation of camelid antibodies administered in a capsule to treat intestinal inflammation, in particular Crohn’s disease.

Whether art.24(4) is engaged

81. I have to decide on the relative significance of the likely issues at trial in these proceedings, should there be a trial. This is to be assessed on the evidence available and the balance of probabilities. The specific question is whether these proceedings will be concerned with the validity of the Patents UK within the meaning of art.24(4).
82. Ian Karet, a partner in Linklaters LLP who has conduct of this action on behalf of the defendants, said this in his first witness statement:
- “85. Should this application not succeed and the UK Claim continue the Defendants would intend to raise a number of defences. These include limitation under the Limitation Act 1980; invalidity of the patents in suit; lack of infringement due to activities complained of being experimental and covered by the [Unilever] Licence and in particular because V565 is not an antibody to a ‘specific pathogen’; and absence of any common design.”
83. Validity will be an issue at trial if the action goes ahead. At this point there are no Particulars of Invalidity, but it would be an unusual action in the Patents Court if there were not well-developed arguments on lack of novelty and/or inventive step over several citations of prior art, probably disputes over the common general knowledge and possibly detailed allegations of insufficiency and/or added matter. This is the norm.

If the defendants wished the court to believe that the present action would differ from the norm, it was incumbent on them to explain why. There was nothing.

84. Save for one issue, Ms Lane did not press the other matters mentioned by Mr Karet. I must assume that any argument on limitation, experimental use and joint tortfeasance would not take up much time in preparation or in court. To the extent that there will be argument about when the work on V565 was done, Ms Lane did not say that this is likely to be significant either. Her submission was that the trial would be substantially about the scope of the Unilever Licence and thereby VHsquared's licence.
85. Ms Lane took me to the Particulars of Infringement which sets out the history and alleged effect of the licences in some detail. She invited me to infer that inevitably the trial will for the most part be taken up with arguments about the scope of VHsquared's licence. I don't see why. The defendants have, entirely reasonably, avoided entering an appearance and so there is no pleaded Defence. But one real possibility is that little or none of Ablynx's argument on the scope of VHsquared's licence will be in dispute. It was again incumbent on the defendants to provide at least some reason for me to suppose that there will be arguments of substance on the scope of the licence.
86. The defendants might seek to re-argue all their points on the scope of Unilever Licence which did not succeed in the first Dutch litigation. Neither side raised issue estoppel. The infringing product would be different: it is now V565 instead of the rotavirus antibody. I was not told whether, and if so why the defendants believe that the conclusion of the Dutch Court of Appeal on scope was wrong. I accept that the Dutch Court of Appeal (in the first Dutch Action) did not have to consider V565. This might make some difference. But Crohn's disease involves an abnormal reaction of the patient's immune system to certain bacteria in the intestines. The ailment is treated by V565. If the view on the limits of Unilever's licence by the Dutch Court of Appeal in its paragraph 4.11 (see above) is taken to be correct, the ways in which argument on the scope of that licence can be reheated might be limited.
87. Even assuming the arguments on scope before the Dutch courts are revisited, I have no real doubt that if the present proceedings progress to trial, they will be concerned with the validity of the Patents within the meaning of art.24(4). Art.24(4) is engaged.

Whether *prima facie* there is a binding art.25 agreement

88. In case I am wrong about the engagement of art.24(4), I will consider whether the defendants have established that, at least *prima facie*, art.9.1 of the Unilever Licence constitutes an agreement awarding exclusive jurisdiction to the Brussels courts within the meaning of art.25 of Brussels I recast, that it binds Ablynx and that it applies to the present proceedings.
89. The question whether there was an agreement which qualifies as such within the terms of art.25 is a matter to be determined according to EU law. But it seems to me that the underlying facts, whether there was a consensus of any kind and if so what form it took, depends in part on the national law governing the agreement, particularly a written agreement. It must be assumed that parties intend the result which follows from an agreement expressed in those words in that context when interpreted under the relevant national law.

90. It was common ground that the Unilever Licence and the Novation Agreement are governed by Belgian law. There was evidence of Belgian law given by Pieter Van Den Broecke, a partner of Linklaters LLP in Brussels for the defendants and by Jean-Christophe Troussel, a partner of Bird & Bird in Brussels for Ablynx.
91. Mr Turner advanced two grounds for saying that there was not even a *prima facie* case that the defendants could rely on the alleged choice of jurisdiction agreement:
- (1) art.9.1 of the Unilever Licence did not have the effect contended for by the defendants; and
 - (2) as a matter of Belgian law Ablynx could not be bound by art.9.1.

The effect of art.9.1

92. Mr Turner did not dispute that art.9.1 awarded exclusive jurisdiction to the Brussels courts in relation to disputes between the parties or their (sub)licensees concerning the Unilever Licence. Such parties would include Ablynx and VHSquared. He said that there were three reasons why art.9.1 nonetheless did not have the effect claimed by the defendants.
93. First, art.9.1 was not concerned with a dispute about the scope of the Reserved Sector. Such disputes fell within art.9.2 which was expressly stated to be in exemption from art.9.1. Under art.9.2 disputes on the definition of the Reserved Sector were to be exclusively determined by arbitration, not the Belgian courts. Moreover, Mr Turner argued, art.9.2 did not refer to sublicensees, so Ablynx as a sublicensee was not bound by art.9 in relation to a dispute about the Reserved Sector. He submitted that this made sense. Art.3.4 of the Unilever Licence required that when Unilever or its (sub)licensees wished to commence exploitation of the Patents, they should enter into negotiations with VUB, to be conducted in good faith, with a view to settling royalties. Mr Turner said that art.9.1 applied to disputes about art.3.4 and so Unilever's (sub)licensees had to be entitled to the benefit and burden of art.9.1. No such benefit and burden was necessary for (sub)licensees in respect of disputes under art.9.2.
94. Secondly, art.9.1 only applied to a dispute concerning the Unilever Licence. This meant that it was limited to disagreements about the meaning and effect of the agreement itself. A claim for patent infringement was a claim in tort which depended in part on the construction of the Unilever Licence but was not a matter concerning the Unilever Licence.
95. Mr Troussel gave evidence in support of this second reason. He referred to articles of the Belgian patent statute and said that under Belgian law a choice of jurisdiction clause in a patent licence could not impede a licensor's right to assert the patent against a licensee acting outside the terms of the licence. On behalf of VHSquared Mr Van Den Broecke said that in Belgian law tortious claims for damages and other extracontractual claims which are connected with a contractual relationship are deemed to be covered by a jurisdiction clause in the contract unless it is stated to be limited to contractual claims. He referred to a commentary by U. Magnus and P. Mankowski.
96. Thirdly, Mr Turner submitted that art.9.1 had been disapplied by the novation of the licence from VUB to BAC in place of the Unilever Licence. It was common ground

that in Belgian law the effect of a novation is to bring the old agreement to an end; it is substituted by the new agreement. The Novation Agreement included arts.3.1(a) and (d) and 7.1 (see above).

97. It will be recalled that BAC granted back to Unilever NH a non-exclusive worldwide licence to exploit the Patents in the Reserved Sector. Mr Turner argued that this licence back to Unilever NH, the licence relied on by the defendants, is governed solely by art.7.1 of the Novation Agreement which does not confer exclusive jurisdiction on the Brussels courts.
98. Again, there was a disagreement between the experts on the continuing effect under Belgian law of a jurisdiction clause in an agreement which has been replaced by a novated agreement. Mr Van Den Broecke said that a jurisdiction clause in the old agreement could endure if the parties agreed to transfer all rights and obligations. Mr Troussel's evidence was that in Belgian law all rights and obligations under the old agreement are terminated and replaced by those under the novated agreement.
99. The difficulty I have with Mr Turner's first point is that I am not sure where it leaves (sub)licensees who wish to raise a dispute about the Reserved Sector, potentially a significant matter. They might be safeguarded by their (sub)licence, yet they might not. I cannot accept that Mr Turner's construction of art.9(1) and (2) is unarguably correct.
100. The second and third arguments both require the resolution of conflicting evidence on aspects of Belgian law. In neither instance do I believe that I can arrive at a clear answer, at least not an answer which leaves the defendants without a *prima facie* case.
101. I am not persuaded by any of the three reasons advanced by Mr Turner in support of his argument that the defendants do not have even a *prima facie* case that art.9.1 has the effect for which they contend.

Ablynx in law not bound by art.9.1

102. The issue of law on which Mr Turner relied for his second ground was that a third party to an agreement may in some circumstances take the benefit of a term in a contract but not a burden. In addition, a third party is not obliged to take the benefit if he chooses not to. Mr Turner pointed to indirect evidence from Mr Troussel, given in a witness statement of Morag Macdonald, a partner of Bird & Bird with conduct of the proceedings for Ablynx:

“33. Mr Troussel informs me that section 1121 of the Belgian Civil Code does allow parties to a contractual arrangement to specify that a particular contractual term can be expressed to be made for the benefit of a third party who is not a party to the contract. Where a contractual term of this nature exists it may be enforced by the third party against the parties to the contract. ... Mr Troussel also informs me that under Belgian law that the Belgian Supreme Court has held in Supreme Court 27 September 1974, *Arr Cass.*, 1974-5, 125 that for such a right to be created, the intention of the parties to make such a commitment towards third parties must be clear and unambiguous.”

103. Mr Turner argued that in the present case art.9.1 is not being relied on by the third party, namely Ablynx, for its benefit. On the contrary, it is being used by the defendants as a

defence to Ablynx's action for patent infringement. As a matter of Belgian law art.9.1 cannot be invoked in this way. I was also taken to the judgment of the English Court of Appeal in *Firswood Ltd v Petra Bank* [1996] CLC 608 at p.8 and in *Schiffahrtsgesellschaft Detlef Von Appen GmbH v Wiener Allianz Versicherungs AG* [1997 CLC 993, but I found these to be of limited assistance since the issue is one of Belgian, not English law.

104. Mr Van Den Broecke again disagreed with Mr Troussel, although not as clearly as he might have done:

“13. Other than as stated in paragraph 33 of Ms Macdonald's witness statement, under Belgian law, if contracting parties decide to confer contractual rights to third parties...it is irrelevant whether that third party relies on that contractual right as a plaintiff or rather to defend itself against a claim issued by another party.”

105. I am not sure what qualification Mr Van Den Broecke intended when he said “Other than as stated in paragraph 33 of Ms Macdonald's witness statement”. But I accept that there is a *prima facie* case that VHSquared is not barred under Belgian law from relying on art.9.1 of the Unilever Licence, assuming that article has the meaning and effect which the defendants say it has.

Conclusion on whether there is a binding art.25 agreement

106. I am satisfied that the defendants have established a *prima facie* case that, had art.24(4) not been engaged, the Unilever Licence would have conferred exclusive jurisdiction over the present proceedings on the courts of Brussels.

Section 9 of the Arbitration Act 1996

107. The defendants argued that I should grant a stay of these proceedings pursuant to s.9 of the Arbitration Act 1996 if I were satisfied that art.9.2 of the Unilever Agreement applies to the proceedings. I have not reached that conclusion. I have decided only that there is a *prima facie* case that art.9.1 applies and is enforceable in respect of the present proceedings.

Cause of action estoppel

108. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 Lord Sumption adopted the explanation of cause of action estoppel stated by Lord Keith in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, at p.105:

“Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.”

109. Ms Lane argued that there was a cause of action estoppel applicable to these proceedings because the first Dutch action involved the same parties, at least by the time of the appeal, and involved the same subject matter.
110. VHSquared was not a party to the first Dutch action. In so far as that action encompassed a UK designated patent, its subject matter (a) concerned only EP 013 and (b) involved an allegation that EP 013 was infringed by acts done in relation to the rotavirus antibodies, not V565.
111. Ms Lane argued that this still left EP 031 and the declarations sought in the Dutch action were broad enough to encompass V565.
112. In *Virgin Atlantic* Lord Sumption discussed the degree to which cause of action estoppel could arise in respect of points not raised in the earlier proceedings. He said:

“[22] *Arnold v National Westminster Bank plc* [1991 2 AC 93 is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”

113. The question whether V565 infringes the UK designation of EP 013 was not considered, far less decided by the Dutch Court of Appeal. It was not a question that could have been raised with reasonable diligence. Ablynx did not know about V565 until June 2017, long after November 2012 when the proceedings were started and December 2013 when The Hague District Court gave its judgment and even after the Court of Appeal’s judgment in June 2016. In my view, there can be no cause of action estoppel in respect of the allegation that EP 013 is infringed because in the present proceedings it is alleged that the infringing product is V565, not the rotavirus antibody. Self-evidently there can be no estoppel in respect of the Patents UK not relied in the Dutch proceedings.

Service of the claim form and particulars of claim

114. Ms Lane told me that there were three defects in the service of the claim form and the particulars of claim.
115. The first was that in breach of CPR 6.34(1)(b) the claim form was not served with Form N510, the form which contained the statement of the grounds on which the claimants were entitled to serve the claim form out of the jurisdiction. (Form N510 was filed pursuant to rule 6.34(1)(a), but it was not served.)

116. The second was that although Ablynx pleaded reliance on the relevant licences to establish its exclusive licence, copies of them were not served with the particulars of claim in breach of PD63, para. 4.1(2).
117. The third was that in breach of PD51U, para. 5.1, Ablynx did not serve an Initial Disclosure List of Documents with the claim form or particulars of claim and that the Initial Disclosure List was not served until five days after the date on which the claim form expired for service within the jurisdiction.
118. Mr Turner admitted the breaches. Ms Lane did not suggest that any of them had caused the defendants any prejudice. Neither did she direct my attention to any sanction under the rules from which Ablynx expressly requires relief pursuant to CPR 3.9. However, Ms Lane referred to the judgment of Edwards-Stuart J in *Venulum Property Investments Ltd v Space Architecture Ltd* [2013] EWHC 1242 (TCC); [2013] 4 Costs LR 596. This was an application to extend time for service of the particulars of claim. Edwards-Stuart J ruled that the court's discretionary power to extend time should be exercised according to the framework set out in CPR 3.9. He refused to extend time, stating three factors that were of particular importance: (i) the claimant delayed for five years between the event complained of and service without any explanation for the delay; (ii) the claim was not a strong one; and (iii) the claimant was advancing a claim for bad faith pleaded in particularly vague terms such that the claimant did not merit indulgence.
119. There are no equivalent factors in the present case. Ablynx did not become aware of V565 until June 2017 and the delay of just over a year in starting the action can be explained by attention being focussed on the litigation in the Netherlands. I have no basis on which I could say that Ablynx's claim is weak (or strong). In my view, none of the breaches of the rules was either serious or significant within the meaning given to those terms by the Court of Appeal in the context of the first stage of the assessment under CPR 3.9, see *Denton v T H White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3296.
120. I decline to set aside service of the claim form or particulars for breach of the rules.

Conclusion

121. This court has exclusive jurisdiction over the present proceedings pursuant to art.24(4) of the Brussels I recast. If art.9.1 of the Unilever licence would otherwise confer exclusive jurisdiction on the Brussels courts, art.9.1 has no legal force because it purports to exclude the exclusive jurisdiction of this court. Art.31(2) is therefore not engaged. The application is dismissed.